cited therein, the defendants' claim of set-off was in relation to one of the vehicles respecting which the plaintiffs claimed for storage and was closely interwoven with it. Similarly, unconditional leave to defend should be given where the defendant has no defence to the plaintiff's claim but raises a *bona fide* counterclaim which is in the nature of a defence to the claim. *Zoedone Co.* v. *Barrett.*[12] But where on the pleadings and affidavit evidence there is clearly no defence to the plaintiff's claim and the counterclaim raised has no connection with the plaintiff's claim, the plaintiff is entitled to judgment: *Rotherham* v. *Priest*[13]; *Sheppards & Co.* v. *Wilkinson & Jarvis.*[14] As already indicated, with the exception of the 24 items dated May and June 1982 contained in the list marked "A" annexed to the respondents' defence and counterclaim, the remaining items therein are unconnected with that part of the appellant's claim of $17,601.46 being the price of goods ordered and delivered.

Insofar the appellant's claim of $17,601.46 being the price for the diesel and oil products ordered and delivered, the respondent has failed to establish that there is an issue to be tried or that for some other reason there ought to be a trial. Accordingly, I allow the appeal to the extent set out below. The order of the lower court is rescinded. There shall be judgment for the appellant against the respondent for the sum of $17,601.46 with interest at 8% per annum from to-day until payment. In the circumstances of the case including the fact that there is a counterclaim which exceeds the claim of the appellant, I would exercise my discretion and order that execution on the said judgment be stayed until trial of the respondent's counterclaim or until further order. (*Lee Guat Eng* v. *Seet Tiam Hock*[15]).

The residue of the amount claimed in the Statement of Claim *i.e.* the sum of $909.41 from the 24 items aforesaid shall be tried, and the respondent is at liberty to defend the action in respect thereof.

As to costs, since the appellant has substantially though not wholly, succeeded in this appeal and should have likewise substantially succeeded in its application in the lower court, there shall be an order that 2/3 of the costs of this appeal and 2/3 of the costs of the application to the lower court be the appellant's in any event.

Order accordingly.

Solicitors: *Battenberg & Talma; Yong & Wong.*

HO AH KIM & ORS. v. PAYA TRUBONG ESTATE SDN. BHD.

[O.C.J. (Mohamed Dzaiddin J.) February 22, 1984, August 20, October 9 & December 20, 1985]

[Penang – Civil Suit No. 251 of 1980]

Contract – Sale and purchase of land – Specific performance – Defence of limitation – Compensation for breach of contract by defendants in substitution for specific performance – Refund of deposit paid by purchaser – Specific Relief Act 1950, ss. 11 & 18 – Limitation Act 1953, s.9(1).

The plaintiffs are the executors of the estate of Liew Yeong Choy, deceased, who entered into an agreement in writing dated February 19, 1972, with the managing director of the defendant company whereby the deceased agreed to buy and the defendant company agreed to sell a portion of its land to the extent of about 15 acres. Upon the execution of the agreement, the deceased paid the sum of $18,000.00. Clause 1 spells out the terms of the agreement for sale. Clause 2 states that the defendants shall from time to time keep the deceased informed about the Penang Government's option. Correspondence passed between the defendants and the deceased. The defendants indicated to the deceased that he could buy the land at $7,000.00 per acre, not at the old price of $4,000.00. Eventually on January 20, 1980, the defendants' solicitors wrote to the plaintiffs' solicitors refunding the sum of $18,000.00 which purported to discharge the defendants from the said agreement, thus giving rise to the present proceedings by the plaintiffs for specific performance or damages for breach of contract.

Held: (1) in an action for specific performance of an agreement for sale of land, section 9(1) of the Limitation Act 1953, applies. In the present case, the alleged breach occurred on January 20, 1980. Therefore time began to run from that date. Even if the right of action accrued from the expiry of the "option" on July 10, 1973, the plaintiffs were still within the 12-year period from May 24, 1980, when the plaintiffs filed their statement of claim;

(2) the agreement for sale is not void *ab initio* for uncertainty but enforceable at law;

(3) on the defence of laches and acquiescence as pleaded in para. 10 of the defence there is clear evidence from the correspondence and the defendant DW1 that the parties were at all times negotiating for specific performance of the said agreement. In fact, the defendants through their solicitors impliedly gave the deceased a false hope of furnishing a detailed agreement to be executed between the parties. This was followed by the negotiations about the price. The court is therefore satisfied that the defence of laches and acquiescence cannot succeed;

(4) the court did not grant specific performance but awarded compensation for breach of the agreement. In the circumstances it is fair and reasonable to assess compensation on the basis of $4,000.00 per acre being the purchase price originally agreed between the parties..The defendants were ordered to pay the plaintiffs the sum of $60,000.00 as compensation. They must also refund the sum of $18,000.00 paid as deposit. Costs of the action to the plaintiffs.

Cases referred to:

(1) *Nasri* v. *Mesah* [1971] 1 M.L.J. 32.
(2) *Tan Swee Lan* v. *Engku Nik binti Engku Muda & Ors.* [1973] 2 M.L.J. 187.
(3) *Mt. Bolo* v. *Mt. Koklan & Ors.* L.R. 57 I.A. 235; A.I.R. 1930 P.C. 270.
(4) *Scamell* v. *Ouston* [1941] 1 All E.R. 14 (H.L.)
(5) *Oxford & Ors.* v. *Provand & Anor.* (1868) L.R. 2 P.C. 135 @ 151.

CIVIL SUIT.

Ngan Siong Hing for the plaintiffs.

S. Thillaimuthu (Andrew Lim Tat Keong with him) for the defendants.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: The plaintiffs are the executors of the estate of Liew Yeong Choy, deceased. The defendants are a company incorporated in Malaysia and at all material times were the registered owners of land known as Lots 1874 and 2494 Mukim 13, North East District, Penang ("the said land"). Lot 1874 has since been subdivided into lots 2551 and 2552.

The deceased entered into an agreement in writing dated February 19, 1972 (AB1-2) ("the said Agreement") with Foo Meow Fong (D.W.1) who was the managing director of the defendant Company whereby the deceased agreed to buy and the defendant Company agreed to sell a portion of the said land to the extent of 15 acres or of a lesser area. The main terms are set out in Clause 1 of the agreement which reads as follows:

"1. In pursuance of the above premises and in consideration of the sum of Dollars Eighteen Thousand ($18,000.00) only now paid by the Second Party to the First Party (the receipt whereof is hereby acknowledged) the First Party hereby agrees to sell the said 15 acres or any lesser area of the said lands to the Second Party or its nominee or nominees in the following manner:

a) In the event of the Government of Penang exercising the said Option and the said portion or portions of the said Lands are sold under negotiation the Second Party shall purchase the said 15 acres or any lesser area at the price offered by the Penang Government per acre subject to the sum of $18,000.00 paid under Clause 1 hereof to account of the purchase price;

b) In the event of the Penang Government not exercising the said Option and acquiring the said Lands by acquisition the Second Party shall purchase a selected fifteen (15) acres or any lesser area at Dollars Four Thousand ($4,000.00) per acre less the sum of $18,000.00 paid under Clause 1 hereof;

c) In the event of the Government of Penang not exercising the compulsory acquisition of the said Lands the Second Party shall purchase a selected area of 15 acres or any lesser area at $4,000.00 per acre less $18,000.00 paid under Clause 1 hereof."

It is to be noted that in the last two paragraphs in the habendum of the agreement, there is reference to an option granted by D.W.1 to the State Government of Penang for sale of certain portions of the said land and that such option would expire on July 10, 1973. However, according to D.W.1 no such option was granted by him or the defendant Company and this may be a reference to a possible acquisition of undefined portions by the State Government.

On execution of the agreement for sale, the deceased paid $18,000.00 as mentioned in Clause 1 of the agreement. In addition, Clause 1 spells out the terms of the agreement for sale. Clause 2 states that the defendants shall from time to time keep the deceased informed about the Penang Government's option.

The facts as found from the correspondence in the Agreed Bundle of Documents and the evidence of D.W.1 appear to be as follows. On July 7, 1973 the deceased wrote to D.W.1 informing him of his desire to complete the agreement. On July 12, 1973 the defendants through their solicitors replied stating that they would be forwarding a draft agreement for sale in the near future. Thereafter, everything came to a standstill until April 22, 1978 when the deceased sent the defendants a copy of a plan which he prepared showing a proposed area of 15 acres of the said land which he selected in compliance with the said agreement. However, the defendants replied informing him that the area he had chosen had already been acquired by the State Government. Then, on December 2, 1978 the deceased forwarded a second plan showing another portion of the said land which he would like to be transferred to him in compliance with the said agreement. This time the defendants replied stating that they could not now sell the 15 acres to the deceased at the old price, but stated that if the deceased was still interested he could then buy at $7,000.00 per acre. About a month later the defendants wrote again to the deceased giving him notice that unless they hear from him by return the offer price of $7,000.00 per acre would be changed. The deceased quickly replied on January 6, 1979 requesting for 7 days to consider the offer. However, by letter dated January 9, 1979 the defendants informed him that the area which he wanted in his second plan had already been sold to a third party and the defendants suggested another por-

tion, which they said fringes the road, and was available at the same price. In fact, by an agreement dated November 13, 1973, (DBI) the defendants sold this portion to one Madam Yap Hui Leng at $3,000.00 per acre. On January 18, 1979 the deceased instructed his solicitors in Penang to register a private caveat against a portion of Lot 2552.

The final episode before the plaintiffs commenced the present action was a letter written by the defendants' solicitors to the plaintiffs' solicitors forwarding a cheque for $18,000.00 being a refund of deposit paid by the deceased under Clause 1 of the said agreement on the ground that the defendants had been discharged from the said agreement.

The plaintiffs now claim specific performance of the said agreement or damages in lieu thereof and consequential reliefs. It seems clear to me that there are two main issues for my determination in this case. First, is the plaintiffs' action statute-barred under the Limitation Act 1953? Secondly, is the contract in the agreement for sale enforceable at law?

Limitation

I have requested both counsel to submit written submissions on the question of limitation which was raised by the defendants in para. 11 of the defence. The paragraph reads as follows:

"The defendants will further rely on the Limitation Act 1953 and aver that the deceased's alleged cause of action under the said agreement did not arise within 6 years before the commencement of this action and is barred by section 6 of the Act."

This is a claim for specific performance of an agreement for the sale of land, which said agreement was entered into between the parties on February 19, 1972. The plaintiffs filed the statement of claim against the defendants on May 24, 1980. It is the contention of the defendants that the cause of action under the said agreement started upon the happening of a contingency which was on the expiry date of the "option" granted by the defendants to the State Government of Penang, *i.e.* July 10, 1973.

Counsel for the plaintiffs however submits that the relevant section of the Limitation Act 1953 is not section 6, as pleaded in the defence, but section 9, which reads as follows:

"9(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person."

The Federal Court case of *Nasri* v. *Mesah*[1] was cited as authority where Gill F.J. held that in any case for recovery of land the period of limitation is 12 years and that time begins to run from the date of infringement.

In my judgment, in an action for specific performance of an agreement for the sale of land, section 9(1) of the Limitation Act applies. Despite the comment of the learned author Prof. Visu Sinnadurai's "Sale and Purchase of Real Property in Malaysia" 1984 Ed. P. 440, I am still bound by the decision of the Federal Court in *Tan Swee Lan* v. *Engku Nik Binti Engku Muda & Ors.*[2] where *Nasri's* case was considered. In that case the appellant had claimed specific performance of an agreement made on April 12, 1958 between the appellant and the respondents. On March 2, 1970 the appellant wrote to the defendants claiming performance of the agreement. On March 16, 1970 the respondents replied that they were not taking steps to effect the transfer and they challenged the validity of the agreement. The writ was then issued on April 16, 1970. The learned trial Judge held that the action was statute-barred. As the appellant was not in possession of the land he held that time ran from the date of the agreement. In allowing the appeal, the Federal Court held that the period of limitation ran from the date that the respondents threatened to infringe the appellants' right by saying that they refused to effect the transfer of the land. It was immaterial that the appellants were not in possession of the land. Therefore the defence of limitation failed.

The Federal Court also cited the Privy Council case of *Mt. Bolo* v. *Mt. Koklan & Ors.*[3] where it was stated:

"There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted."

In the present case the alleged breach or infringement occurred on January 20, 1980 when the defendants' solicitors wrote to the plaintiffs' solicitors refunding the sum of $18,000.00 which purported to discharge the defendants from the said agreement. Therefore, time begins to run from January 20, 1980. Even if the right of action accrued from the expiry of the "option" on July

10, 1973 the plaintiffs were still within the twelve year period. In the circumstances, the plaintiffs' action is not statute-barred.

Is the Agreement for Sale enforceable at law?

It is the plaintiffs' contention that the agreement is subsisting and that they are entitled to reliefs sought in their Statement of Claim. The defendants, on the other hand, contend that the terms of the agreement are vague, indefinite or uncertain, that it cannot be ascertained with reasonable certainty as to the real intention of the parties. It is also the contention of the defendants that the language used in the agreement for sale is so obscure and incapable of any definite or precise meaning of the purported sale that it is not possible to attribute to the parties any definite contractual intention. The terms are open to endless doubt and speculation. In the circumstances, there is therefore no contract enforceable at law *i.e.* no *consensus ad idem* can be held to exist. It follows that if there is no such contract the defendants cannot be made liable for breach of the said contract.

It seems clear that the agreement for sale was prepared by laymen without professional advice. It was in no way remarkable as it was a two-page agreement. Nevertheless, the Court in deciding the issues raised in the pleadings must try and consider the meaning of the terms of the agreement for sale and their effect and see if there was a concluded bargain which settled everything that is necessary to be settled and left nothing to be settled by agreement between the parties.

In this regard, it is important to consider the terms of the agreement as per clause 1 of AB1-2. It is not disputed that the sale of the portion of the said land to the extent of 15 acres or lesser area is made subject to sub-clause (a), (b) and (c). My reading of sub-clause (a) is that the defendants are obliged to sell the deceased the said portion upon the State Government exercising its "option" at the same price which the State Government will pay subject to the sum of $18,000.00 which had already been paid by the deceased to D.W.1. Clauses (b) and (c) plainly convey an intention on the part of the parties that in the event of the State Government not acquiring the said land, then the deceased shall purchase a selected area of 15 acres or any lesser area at $4,000.00 per acre less the sum of $18,000.00 which had already been paid by way of deposit. In fact, it is not disputed that the State Government did not purchase any of the defendants' land but instead compulsorily acquired 670 acres of the said land. In *Scamell* v. *Ouston*[4] Lord Wright said at p.26:

> "The test of intention is to be found in the words used.... It is a necessary requirement that an agreement in order to be binding, must be sufficiently definite to enable a court to give a practical meaning. Its terms must be so definite or capable of being made definite without further agreement between the parties, that the promises and performances to be rendered by each party are reasonably certain."

In the same case, Viscount Maugham said at p.16:

> "In order to constitute a valid contract, the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that unless this is done it would be impossible to hold that the contracting parties had the same intention."

In my opinion the above requirements have been satisfied in the present case. The parties knew what their contractual intentions were. What needed to be resolved was the actual location by way of demarcation of the "15 acres or any lesser area." In fact, this was what the deceased had precisely attempted to do. By a letter dated July 7, 1973 (Exh. AB3) the deceased wrote to D.W.1 informing him that he was going to complete the sale under the agreement upon the expiry of an "option" on July 10, 1973 given to the State Government of Penang. However, on July 12, 1973 (Exh. AB4) the defendants' solicitors informed the deceased that they would be forwarding a draft agreement for sale "in the near future." Eventually, on April 22, 1978, some five years after the solicitors' letter, the deceased wrote again to D.W.1, this time forwarding him a copy of a plan showing the 15 acres which he had selected for subdivision under the said agreement. He was however told by the defendants that the area which he had selected and marked on the plan had been acquired by the State Government. Then, on December 2, 1978 the deceased submitted another plan which contained an area of 15 acres for subdivision by the defendants. The reply he received was quite startling. By a letter dated December 5, 1978 the defendants told him that they could no longer sell the 15 acres of the said land at the old price but was willing to dispose of at $7,000.00 per acre. In my opinion, the conclusion that can be drawn is that the contract for the sale of the said 15 acres is no longer in dispute, but what they were interested was to sell the land at an increased price due to lapse of time since the time the said agreement was executed. In fact, D.W.1 confirmed

this in his evidence where he also testified that the defendants were negotiating for a new agreement with the deceased. It can be concluded that it may be for this reason that they are resisting the plaintiffs' claim and are raising the defence of lack of *consensus ad idem.*

Based on the evidence and the written submissions (a considerable part being references to case laws) in my judgment this agreement for sale, AB1-2, is not void *ab initio* for uncertainty, but enforceable at law.

On the defence of laches and acquiescence as pleaded in para. 10 of the defence there is clear evidence from the correspondence and D.W.1 that the parties were at all times negotiating for specific performance of the said agreement. In fact, the defendants through their solicitors (Exh. AB4) impliedly gave the deceased a false hope of furnishing a detail agreement to be executed between the parties. This was followed by the negotiations about the price. I am therefore satisfied that the defence of laches and acquiescence cannot succeed.

For the above reasons, in my judgment, the defence fails on all the three grounds *i.e.* limitation, unenforceability of the agreement for sale and laches and acquiescence.

Now having held that the said agreement is valid, the final question for my determination is whether or not in the circumstances of the case I should order specific performance of the said agreement. In considering this issue, it is important to bear in mind that since the execution of the said agreement the parties between themselves have not agreed on the selected area of "15 acres or lesser area" to be alienated to the plaintiffs although the deceased had made two attempts to choose the location where he was told that they had already been acquired by the State Government and the other was sold to Madam Ho. As their Lordships of the Privy Council declared in *Oxford & Ors.* v. *Provand & Anor.*[5]:

> "It is clear that the court may exercise a discretion in granting or withholding a decree for specific performance; and in the exercise of that discretion, the circumstances of the case, and the conduct of the parties and their respective interests under the contract, are to be remembered."

There is a presumption in favour of specific performance of a contract to sell land, which is statutorily provided in section 11 sub-section 2 Specific Relief Act 1950 which reads as follows:

> "(2) Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money."

However, in the present case, I think it may be difficult due to the changes in the area of the said land for the parties to agree on the particular location to be demarcated for sub-division for alienation to the plaintiffs pursuant to the said agreement. The plaintiffs have pleaded in prayer 3 of the Statement of Claim for damages for breach of contract in lieu of or in addition to specific performance. Therefore, in the exercise of my discretion which is statutorily provided in section 18 Specific Relief Act 1950, I am inclined in the present case, for reasons which I have stated above not to grant specific performance of the said agreement but to award them compensation for breach of the said agreement. In the circumstances, it is fair and reasonable to assess compensation on the basis of $4,000.00 per acre being the purchase price originally agreed between the parties. Accordingly, I order the defendants to pay the plaintiffs the sum of $60,000.00 as compensation in substitution for specific performance. In addition the defendants shall refund the plaintiffs the said sum of $18,000.00 which was paid to them as deposit. Costs of this action to the plaintiffs and liberty to apply.

Order accordingly.

Solicitors: *Abbas & Ngan; Thillaimuthu & Phock Kin.*

SI RUSA INN SDN. BHD. & ORS. v. THE COLLECTOR OF LAND REVENUE, PORT DICKSON & ORS.

[O.C.J. (Peh Swee Chin J.) December 31, 1985 & January 18, 1986]

[Seremban - Originating Motion No. 17 of 1983]

Land Law – Private right of way – Collector's discretion in granting such right – "expedient" – Meaning of – National Land Code, ss. 11(d), 34, 387, 389(3), 390(3), (4), 418(2) & 434.

This was an appeal against an order of the Collector of Land Revenue, Port Dickson, granting to the second respondent (the Grantee) a private right of way over a piece of land, Lot No. 293, against the first appellant, its registered owner, the second appellant, its registered lessee and the